Supreme Court, U.S.
FILED
MAY 3 1995
OFFICE OF THE CLERK

No. 94-12

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SEMINOLE TRIBE OF FLORIDA,
Petitioner,
v.
STATE OF FLORIDA and LAWTON CHILES,
GOVERNOR OF FLORIDA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

RICHARD G. TARANTO
FARR & TARANTO
2445 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

RICHARD RUDA *
Chief Counsel
LEE FENNELL
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 434-4850
* *Counsel of Record for the* Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether an Indian Tribe may sue a State or its Governor in a federal court under the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7), notwithstanding the inability of the court under the Act to issue an enforceable judgment vindicating the Tribe's interests and notwithstanding the States' general sovereign immunity from suit in federal court.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE AMICI CURIAE	1
STATEMENT	2
SUMMARY OF ARGUMENT	3
ARGUMENT	7
I. JURISDICTION OVER THE TRIBE'S SUIT IS INCONSISTENT WITH ARTICLE III BECAUSE THE FEDERAL COURT CANNOT ISSUE AN ENFORCEABLE JUDGMENT VINDICATING THE TRIBE'S INTERESTS	7
II. THE FEDERAL COURT'S EXERCISE OF JURISDICTION OVER THE TRIBE'S SUIT VIOLATES THE CONSTITUTION'S PROTECTION OF THE STATES' SOVEREIGN IMMUNITY	15
A. *Ex Parte Young* Does Not Remove The Tribe's Claim Against The Governor From The Coverage Of Eleventh Amendment Immunity	15
B. Congress Did Not Clearly Intend In IGRA To Abrogate The States' Eleventh Amendment Immunity	19
C. Congress Lacked Power To Abrogate The States' Eleventh Amendment Immunity	22
1. Even If *Union Gas* Is Correct, Congressional Power Is Lacking Under the Indian Commerce Clause	22
2. *Union Gas* Should Be Overruled	25
CONCLUSION	30

TABLE OF AUTHORITIES

Cases Page

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937) 12, 13
Arizona v. California, 460 U.S. 605 (1983) 25
Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) 19
Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) 25
Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991) ..... *passim*
Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103 (1948) 8
Cory v. White, 457 U.S. 85 (1982) 18
Dellmuth v. Muth, 491 U.S. 223 (1989) 5, 19
Dept. of Revenue v. ACF Industries, Inc., 114 S. Ct. 843 (1994) 26
Edelman v. Jordan, 415 U.S. 651 (1974) 15, 16, 17
Ex Parte Young, 209 U.S. 123 (1908) ..... *passim*
Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 29
Gordon v. United States, 117 U.S. 697 (decided 1864, printed 1886) 4, 8, 9, 13
Green v. Mansour, 474 U.S. 64 (1985) 4, 16, 17
Gregory v. Ashcroft, 501 U.S. 452 (1991) 26
Hafer v. Melo, 502 U.S. 21 (1991) 16
Hans v. Louisiana, 134 U.S. 1 (1890) 6, 28
Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792) ..... *passim*
Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809) 27
ICC v. Brimson, 154 U.S. 447 (1894) 8, 9
In re Sanborn, 148 U.S. 222 (1893) 8
Katzenbach v. McClung, 379 U.S. 294 (1964) 12
Kentucky v. Graham, 473 U.S. 159 (1985) 16
Kickapoo Tribe v. Babbitt, 43 F.3d 1491 (D.C. Cir. 1995) 20
Kline v. Burke Construction Co., 260 U.S. 226 (1922) 27
La Abra Silver Mining Co. v. United States, 175 U.S. 423 (1899) 9
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 6, 27
Mesa v. California, 489 U.S. 121 (1989) 27

TABLE OF AUTHORITIES—Continued

Page

Missouri v. Fiske, 290 U.S. 18 (1933) 18
Mistretta v. United States, 488 U.S. 361 (1989) 27
Monaco v. Mississippi, 292 U.S. 313 (1934) 22
Morrison v. Olson, 487 U.S. 654 (1988) 12
Muskrat v. United States, 219 U.S. 346 (1911) 7, 8, 9, 13
NLRB v. Warren Co., Inc., 350 U.S. 107 (1956) 14
National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949) 9, 27
Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933) 12, 13
New York v. United States, 112 S. Ct. 2408 (1992) ..... *passim*
Oneida County v. Oneida Indian Nation, 470 U.S. 226 (1985) 22
Oklahoma Tax Comm'n v. Potawatomi Indian Tribe, 498 U.S. 505 (1991) 24
Payne v. Tennessee, 502 U.S. 808 (1991) 25
Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) ..... *passim*
Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) ..... *passim*
Plaut v. Spendthrift Farm, Inc., 63 U.S.L.W. 4243 (Apr. 18, 1995) 8, 9
Powell v. McCormack, 395 U.S. 486 (1969) 13
Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237 (1952) 13
Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 113 S. Ct. 684 (1993) 16, 18, 26
Quern v. Jordan, 440 U.S. 332 (1979) 20, 21
Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838) 24
Steffel v. Thompson, 415 U.S. 452 (1974) 14
United States v. Ferreira, 54 U.S. (13 How.) 40 (1851) 9
United States v. Jefferson Elec. Mfg. Co., 291 U.S. 386 (1934) 9
United States v. Klein, 80 U.S. (13 Wall.) 128 (1872) 9
United States v. Lopez, 63 U.S.L.W. 4343 (Apr. 26, 1995) 26

TABLE OF AUTHORITIES—Continued

	Page
Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983)	27
Wooley v. Maynard, 430 U.S. 705 (1977)	14
Statutes	
Indian Gaming Regulatory Act,	
25 U.S.C. § 2703(8)	2
§ 2710(d)(1)(B)	2
§ 2710(d)(3)(A)	2
§ 2710(d)(7)	*passim*
28 U.S.C. § 1362	21
§ 2201	12, 13
§ 2202	13, 14
29 U.S.C. § 158	14
§ 160	14
Other Materials	
Implementation and Enforcement of the Indian Gaming Regulatory Act, Oversight Hearings before the House Comm. on Interior and Insular Affairs, 102d Cong., 2d Sess. (1992)	21
134 Cong. Rec. 25,377 (1988)	14
S. Rep. No. 446, 100th Cong., 2d Sess. (1988)	11, 14
G. Gunther, *Constitutional Law* (12th ed. 1991)	23
Santoni, *The Indian Gaming Regulatory Act: How Did We Get Here? Where Are We Going?*, 26 Creighton L. Rev. 387 (1993)	14, 20

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

No. 94-12

SEMINOLE TRIBE OF FLORIDA,
Petitioner,
v.
STATE OF FLORIDA and LAWTON CHILES,
GOVERNOR OF FLORIDA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI CURIAE

Amici, organizations whose members include state and local governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. This case raises just such issues: whether a Tribe may sue a State or its Governor in a federal court under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2710(d)(7), notwithstanding the inability of the court under the Act to issue

an enforceable judgment vindicating the Tribe's interests and notwithstanding States' general sovereign immunity from suit in federal court. The Court's decision in this case will affect a significant number of suits under IGRA itself and, more generally, clarify the amenability of States and state officials to suit in federal court. *Amici* have a strong interest in the correct resolution of the issues presented.[1]

STATEMENT

The Seminole Tribe of Florida brought this suit against the State of Florida and its Governor under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2710 (d)(7)(A), (B), alleging a violation of the statutory duty to negotiate in good faith for the purpose of entering into a Tribal-State compact governing the conduct of "Class III" gaming activities, a category that includes casino gambling, lotteries, and other forms of gaming. 25 U.S.C. §§ 2703(8), 2710(d)(3)(A). The Tribe's complaint rested specifically on the State's refusal to negotiate about casino gaming, which Florida viewed as outside the IGRA duty because Florida law generally does not permit anyone to engage in casino gaming. *See* 25 U.S.C. § 2710(d)(1)(B) (Class III gaming activities are lawful, and hence subject to the negotiation duty, only if the State "permits *such* gaming" by others (emphasis added)). The Tribe's suit alleged that IGRA applies here because Florida law permits non-casino types of Class III gaming (and because Florida did not enforce its gaming laws against charities that hold casino nights). *See* Pet. App. 54a-55a, 61a. The parties disagreed, at bottom, about whether IGRA applies to each type of Class III game separately or whether States must negotiate about all types of Class III games if they allow any type.

The defendants moved to dismiss the suit, asserting sovereign immunity as recognized by the Eleventh

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

Amendment. The district court denied the motion, holding that Congress abrogated, and had the constitutional power to abrogate, such immunity in IGRA. Pet. App. 26a, 30a. On an interlocutory appeal, the Eleventh Circuit reversed. *Id.* at 1a-25a. Although the court of appeals agreed with the district court that Congress intended to abrogate States' immunity in IGRA (*id.* at 14a-15a), it concluded that Congress lacked constitutional authority under the Indian Commerce Clause to effect such abrogation. *Id.* at 18a-22a. The court of appeals also held that the Tribe's claim against the Governor was in reality one against the State and could not be brought within the exception to Eleventh Amendment immunity recognized in *Ex Parte Young*, 209 U.S. 123 (1908). Pet. App. 23a-24a. The court accordingly ordered the case dismissed.[2]

SUMMARY OF ARGUMENT

The Tribe's suit was correctly ordered dismissed because allowing federal-court jurisdiction over the suit would violate two distinct constitutional constraints. The first constraint is the Article III prohibition on federal courts' performance of adjudicatory roles inconsistent with the historically accepted notion of "judicial" power. The second constraint is the constitutional prohibition, implicit in Article III and recognized in the Eleventh Amendment, on federal courts' entertaining suits against States where sovereign immunity has not been waived or validly abrogated.

I. IGRA assigns a non-judicial task to the federal courts in violation of Article III. IGRA does not provide for a judicially enforceable judgment that itself vin-

[2] While the interlocutory appeal was pending, the district court decided the merits of the case, granting summary judgment to the state defendants by adopting, in accord with other courts' decisions, the State's game-specific view of the scope of the IGRA duty. Pet. App. 43a-83a. The Tribe's appeal from that judgment is pending in the Eleventh Circuit. *Id.* at 84a.

dicates the Tribe's asserted interests. Rather, the federal court under IGRA can do no more than pronounce a federal-law violation; it cannot carry that judgment into effect so as to secure relief for the Tribe, which must proceed to a non-Article III process (first a mediator, then the Executive Branch) in order to obtain actual relief. The unenforceability of the court's judgment and the dependency on subsequent discretionary Executive Branch action both render IGRA's assignment of jurisdiction to the federal courts inconsistent with long-established principles defining the essential nature of the judicial power under Article III. *See, e.g., Gordon v. United States*, 117 U.S. 697, 702-03 (decided 1864, printed 1886) (opinion of Taney, C.J.); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). Congress, in its effort to avoid independent federalism problems presented by greater intrusions on state sovereignty (*see New York v. United States*, 112 S. Ct. 2408 (1992)), has created a scheme that asks the Article III courts to play an improperly non-judicial role.

II. Independently of that Article III problem, the Tribe's suit was correctly ordered dismissed because both defendants, the Governor and the State, are protected from the suit by the sovereign immunity recognized in the Eleventh Amendment. As to the Governor, the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), should be held inapplicable. *Young* states a doctrine of federal necessity, generally allowing federal courts to *enjoin* state officers to conform their future conduct to federal-law standards; even then, because *Young* displaces an otherwise-available constitutional immunity, the doctrine has been carefully limited so as itself to accommodate States' interests. *See, e.g., Green v. Mansour*, 474 U.S. 64, 68 (1985); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984). Under IGRA, however, the federal court does not issue an injunction compelling compliance with any federal-law standards; and any claim of "necessity" for the federal courts' role in vindicating federal standards (which Congress has refused to set) is utterly hollow. At the same time, applying *Young* to IGRA would involve an extraordinary (if not novel) intrusion on States' sovereign interests, since the object of the IGRA suit is to produce an affirmative exercise of state lawmaking authority (rules for tribal gaming) as a substitute for federal policy choice on the subject. *Cf. New York v. United States, supra.* For each of those reasons, the *Young* exception to the otherwise-fundamental sovereign-immunity principle of our federalist structure should not apply here.

Eleventh Amendment immunity therefore bars this suit unless the immunity has been validly abrogated. But IGRA should not be read as providing a sufficient basis for concluding that the immunity has been abrogated. The Court has made clear that, to find abrogation, it must have "perfect confidence that Congress *in fact intended*" to override States' sovereign immunity. *Dellmuth v. Muth*, 491 U.S. 223, 231 (1989) (emphasis added). IGRA's reference to "State[s]" (25 U.S.C. § 2710(d)(7)) is the sole asserted basis for finding abrogation, but that reference should not by itself be deemed sufficient to demonstrate—in the absence of any other evidence of congressional consideration of the constitutionally significant matter of displacing States' immunity—that Congress actually intended abrogation. Rather, the statute is much more plausibly understood as reflecting a congressional assumption (mistaken, as we have argued) that *Ex Parte Young* made any abrogation unnecessary.

If IGRA is nevertheless read to reflect an intent to abrogate States' immunity, Congress should be held to lack the constitutional power to do so under the Indian Commerce Clause and, indeed, more generally under Article I. As to the narrower point, even if this Court continues to adhere to the holding of *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), that Congress has abrogation authority under the Interstate Commerce Clause, no such authority should be found under the Indian Commerce Clause. The mutuality of interests among the States in legislative power to regulate inter*state*

commerce (power that is intrinsically concerned with protecting States against each other) is at least a conceptually plausible starting point for inferring a structurally implicit "surrender of [sovereign] immunity in the plan of the convention." *Union Gas*, 491 U.S. at 19 (plurality opinion) (internal quotation marks omitted). That starting point is unavailable for congressional authority under the Indian Commerce Clause, because no comparable mutuality inheres in such authority. Indeed, this distinction is mirrored in the Court's decisions in a closely analogous context: although the Eleventh Amendment does not protect States against suits by other States, it does protect States against suits by Tribes. *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991).

In any event, this Court should overrule *Union Gas* and find abrogation authority generally lacking under Article I. Fresh consideration of the Article I issue is warranted because there was no rationale of the Court in *Union Gas* (the fifth vote was wholly unexplained) and federalism interests have acquired greater recognition in constitutional doctrine since *Union Gas* was decided. On reconsideration, the issue should be decided in accord with the fundamental principle that Congress has no power under Article I to assign the federal courts judicial power outside the limits set by Article III—a principle recognized in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), in *Hayburn's Case, supra*, and often since. Allowing abrogation under Article I would violate that principle because States' sovereign immunity is an implicit limit on the judicial power created by Article III. *See Pennhurst*, 465 U.S. at 98; *Hans v. Louisiana*, 134 U.S. 1 (1890). This principle preventing Article I authority from expanding Article III power has special force as applied to an Article III limit, like sovereign immunity, that gives effect to a basic component of our federalist structure. And on the other side of the federal-state balance, there is no sound reason to conclude that a newly broad Article I abrogation authority is peculiarly necessary to vindicate the supremacy of federal law. Finally, the

authority of Congress to abrogate States' immunity under the Fourteenth Amendment—which modified pre-existing constitutional limits on federal power over States on a specifically defined set of subjects—furnishes no basis for inferring that States broadly surrendered their right to insist on sovereign immunity in the plan of the original convention.

ARGUMENT

I. JURISDICTION OVER THE TRIBE'S SUIT IS INCONSISTENT WITH ARTICLE III BECAUSE THE FEDERAL COURT CANNOT ISSUE AN ENFORCEABLE JUDGMENT VINDICATING THE TRIBE'S INTERESTS

The cause of action created by IGRA assigns a novel and dramatically limited role to the federal court hearing the claim. Even if the court agrees with the Tribe's complaint that the State is acting unlawfully (*i.e.*, is failing to negotiate in good faith), the court cannot issue an enforceable order that vindicates the interests asserted in the suit; indeed, real relief for the Tribe ultimately is available only from the Executive Branch. The issuance of an unenforceable judgment declaring a defendant's conduct unlawful, backed by no ability on the part of the judiciary to award any concrete relief, retrospective or prospective, is not a function within the "judicial power" of the federal courts as it has long been understood. Accordingly, the Tribe's suit should be held to exceed the bounds set by Article III and for that reason be dismissed.[3]

A. It has been clear for 200 years that Congress may not assign to the federal courts adjudicatory tasks outside the scope of the "judicial power" contemplated by Article III of the Constitution. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792); *Muskrat v. United States*, 219 U.S. 346, 352-56 (1911). And, as this Court has recently

[3] This issue, though not previously raised and not among the questions on which certiorari was granted, is properly raised in this Court because it is jurisdictional.

reiterated, the "judicial power" created by Article III encompasses certain historically understood essential components, including the power to decide a case conclusively. *Plaut v. Spendthrift Farm, Inc.*, 63 U.S.L.W. 4243 (Apr. 18, 1995). The task assigned to the federal court by IGRA implicates two aspects of the "judicial power" that are closely related to, and equally well-founded in accepted understanding as, those underlying the decision in *Plaut*.

First, numerous decisions of this Court have explained that the judicial power necessarily includes the power to render a judgment, enforceable by the judiciary, that vindicates the legal interest of the plaintiff. "The award of execution is a part, and an essential part of every judgment passed by a court exercising judical power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy." *Gordon v. United States*, 117 U.S. 697, 702-03 (decided 1864, printed 1886) (opinion of Taney, C.J.) (cited with approval in *Plaut*, 63 U.S.L.W. at 4248); *see In re Sanborn*, 148 U.S. 222, 224 (1893) (following *Gordon*'s holding that "as the so-called judgments . . . were not obligatory upon Congress or upon the executive department of the government, but were merely opinions which might be acted upon or disregarded by Congress or the departments, and which this court has no power to compel the court below to execute, such judgments could not be deemed an exercise of judicial power"); *ICC v. Brimson*, 154 U.S. 447, 484 (1894) (quoting *Gordon*, 117 U.S. at 702); *Muskrat*, 219 U.S. at 356, 362 (" 'Judicial power,' says Mr. Justice Miller in his work on the Constitution, 'is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.' "; holding assignment of power invalid because "[i]n a legal sense the judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question"); *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) ("if the President may completely disregard the judgment of the court, it would be only because it is one the courts were not authorized to render"). *See also National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 630 (1949) (Vinson, C.J., dissenting) (Court's decisions "clearly condition the power of a constitutional court to take cognizance of any cause upon . . . the power to pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision") (citing *Muskrat* and *Gordon*).

Second, and relatedly, the Court has made clear in a long line of decisions growing out of *Hayburn's Case* that actual vindication of the plaintiff's interest must be provided by the court's judgment and cannot be made contingent on the subsequent discretionary decision of another branch of the federal government. *See Chicago & Southern Air Lines*, 333 U.S. at 113-14 ("It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action."), citing *Hayburn's Case; United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851); *Gordon; Brimson; La Abra Silver Mining Co. v. United States*, 175 U.S. 423 (1899); *Muskrat; United States v. Jefferson Elec. Mfg. Co.*, 291 U.S. 386 (1934). Because it is the *judgment* awarding relief that is the essential component of the judicial function, not the factual or legal determinations made by the court on the way to entering the judgment,[4] this Article III problem is present whenever the court's ability to

[4] The Court confirmed this in its recent decision in *Plaut*, where the reopening of the final judgment by another Branch did not repudiate any factual or legal determinations underlying the reopened judgment, but changed the substance of the law that was the sole basis for the judgment. 63 U.S.L.W. at 4245 (statute presented no problem under *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), because it changed the law).

award relief is made dependent on subsequent non-ministerial Executive Branch action, even if the Executive is bound to follow component findings of fact or conclusions of law. Non-judicial discretion subsequently to deny the relief sought in the suit creates the *Hayburn's Case* problem.

B. The function assigned to the court by IGRA is incompatible with each of these deeply entrenched understandings defining the Article III concept of judicial power, because of "the limited nature of the relief" (U.S. Br. 25) that IGRA authorizes the judiciary to provide. The statute carefully "prescribes remedial procedures if the district court finds" that the State did not engage in good faith negotiation (U.S. Br. 16). *See* 25 U.S.C. § 2710(d)(7)(B). But those procedures do not allow the district court's judgment to vindicate the Tribe's interests. Worse, concrete vindication of the Tribe's interests ultimately is available, not through the courts, but only by subsequent discretionary action of the Executive Branch.

The Tribe has some interest simply in having the State *negotiate* in good faith, whether or not they conclude a compact on Class III gaming. But that interest is not vindicated by the federal court under IGRA, because IGRA, by its terms, does not provide for an order directing the State to negotiate—much less a judicially enforceable order. Rather, the statute expressly prescribes that the court, if it finds lack of good faith negotiation toward a compact, issue an order to "conclude such a compact" within 60 days. Paragraph (iii).[5] Even then, the court has no power to compel compliance with that order: if the State violates it, by not concluding a compact, IGRA expressly provides that the court merely appoints a mediator—and the court plays no further role. Paragraph (iv). As the Tribe indicates, "[t]he relief sought by the Tribe is an order either to conclude a compact within

[5] We refer here, and in the next several paragraphs in text, to paragraphs of 25 U.S.C. § 2710(d)(7)(B).

sixty days, or to invoke the alternative procedure of mediation." Pet. Br. 29. The State is at no point judicially forced to negotiate.

Although IGRA gives Tribes no more than a legal right to have the State negotiate in good faith, the Tribe's ultimate interest, of course, is in securing a compact from the State or otherwise gaining permission for Class III gaming. And the district court under IGRA, upon finding lack of good faith negotiation, does direct the Tribe to enter a compact. Paragraph (iii). But that order, while on its face seeming to vindicate the Tribe's interest, is only a paper vindication, because it is in no way enforceable by the courts, such as through the usual means applicable to prospective relief, *i.e.*, contempt. Rather, as just noted, if the State fails to conclude a compact, the statute specifies that the court drops out of the picture after referring the entire matter to a mediator. Paragraph (iv). Again, the Tribe cannot, in its lawsuit, judicially secure a compact or other authority for Class III gaming.

In fact, the Tribe cannot, under IGRA, secure any agreement from the State at all. The mediator appointed under IGRA, like any "mediator," cannot impose an agreement: after choosing between the Tribe's and State's proposals "the one which best comports with the terms of [IGRA] and any other applicable Federal law and with the findings and order of the court" (paragraph (iv)), the mediator asks the parties to agree to the choice. Paragraph (v). If no agreement is forthcoming, the Secretary of the Interior takes over the process and, rather than ordering any Tribe-State compact, adopts federal regulations for Class III gaming. Paragraph (vii). Ultimately, then, it is only the Secretary, necessarily exercising a substantial range of discretion, who can provide the Tribe the gaming authority it seeks.[6]

[6] The decision of the Secretary, who is directed to adopt regulations "consistent with" the mediator's choice (paragraph (vii)), at a minimum incorporates the range of discretion exercised by the mediator in choosing the "best" proposal. *See* paragraph (iv); S. Rep. No. 446, 100th Cong., 2d Sess. 19 (1988) (describing range

The Tribe and the United States agree that the judiciary when applying IGRA lacks authority actually to issue an enforceable award of concrete relief. Thus, the Tribe acknowledges that the court's order is "an order which the state can disregard" (Pet. Br. 26) without judicial sanction. And the United States observes that "there is no indication that the State's failure to agree to a compact (or even to participate in negotiations) during [the 60-day] period was intended to expose the State to any more intrusive order or to contempt." U.S. Br. 25.

What IGRA provides for, in short, is a wholly unenforceable judicial pronouncement. This Court has long made clear that Article III does not allow the federal courts to perform such a role. That is enough to invalidate IGRA's assignment of jurisdiction to the federal courts. Worse still, IGRA treats the federal court as merely the first step in a process under which real relief is available only through the subsequent discretionary act of the Executive Branch. That, too, violates long-standing Article III principles.

C. This problem cannot be solved by treating the judgment under IGRA as if it were a declaratory judgment under 28 U.S.C. § 2201, whose general validity under Article III this Court has upheld. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937); *Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249 (1933). For one thing, IGRA by its terms does not provide for a declaratory judgment, but for a carefully defined form of limited relief, and thus occupies the remedial field to the exclusion of 28 U.S.C. § 2201. *See Katzenbach v. Mc-*

of relevant factors). In fact, the statute surely must be read to authorize the *Secretary* to exercise the full range of available discretion. Against the background of the Constitution's separation of powers, Congress cannot be assumed to have conferred discretionary executive power over States on a "mediator," an inferior officer in Appointments Clause terms, appointed by a court and not apparently accountable to the Secretary. *See Morrison v. Olson*, 487 U.S. 654, 675-77 (1988) ("incongruity" standard for cross-Branch appointments).

Clung, 379 U.S. 294, 296 (1964).[7] In any event, no decision of this Court suggests that an action for a declaratory judgment would be consistent with Article III if, as under IGRA, the judgment provides no judicially enforceable relief or, worse, requires subsequent discretionary Executive Branch action to be effective.

To the contrary, the federal declaratory judgment statute has long provided that the judicial declaration of rights is backed by the court's power to enforce the declaratory judgment, if necessary, through further appropriate relief. *See* 28 U.S.C. § 2202; *Powell v. McCormack*, 395 U.S. 486, 499 (1969) ("A declaratory judgment can then be used as a predicate to further relief, including an injunction."). That enforcement power was present in the seminal decisions of this Court holding, contrary to earlier decisions, that Article III does not bar *all* actions for a declaratory judgment. *Aetna*, 300 U.S. at 236 n.1; *Nashville*, 288 U.S. at 260. And those decisions pointedly stressed, in finding no Article III problem, that the judgments were not subject to executive revision (*Nashville*, 288 U.S. at 262, citing *Gordon, supra*) and produced "specific relief through a decree of a conclusive character" (*Aetna*, 300 U.S. at 241, citing *Muskrat, supra*). *See also Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237 (1952). It is these fundamental Article III requirements,

[7] Although the Tribe here pleaded 28 U.S.C. § 2201 in its complaint (J.A. 13a), neither the Tribe nor the United States relies on that provision in their briefs—presumably because any such reliance would be incompatible with their firm insistence, in trying to minimize concern on the Eleventh Amendment issues, that the State is free to "disregard" the district court's judgment in this suit (Pet. Br. 26; *see also* Pet. Br. 29) and that the district court's order under IGRA cannot be enforced by injunction (U.S. Br. 25). As noted below, declaratory judgments under 28 U.S.C. § 2201 *are* enforceable under 28 U.S.C. § 2202.

The same problem of inconsistency with IGRA would plague any invocation of other remedies (in federal or state court) that go beyond the carefully prescribed remedial procedures of IGRA.

which must be met even for a declaratory judgment action to be valid, that IGRA fails to meet.[8]

The Article III problems with IGRA likewise cannot be solved by analogy to the judicial role in certain labor-law cases. Under the National Labor Relations Act, for example, a federal court can hear a suit alleging a lack of good faith bargaining and render a judgment ordering good faith bargaining. 29 U.S.C. §§ 158(d), 160(a), (c), (e). The federal court's order, however, is classically judicial: an injunction backed by the power of contempt for its violation. *See NLRB v. Warren Co., Inc.*, 350 U.S. 107, 112-13 (1956). The judicial role in that situation thus furnishes no precedent for the non-judicial role assigned to federal courts by IGRA.

D. The Article III problem with IGRA cannot properly be avoided by a judicial construction of the statute that would ignore "the limited nature of the relief authorized by IGRA" (U.S. Br. 25) by expanding the courts' remedial authority. As a matter of congressional intent, the "innovative" jurisdictional scheme set up by IGRA (U.S. Br. 28) must be understood as an essential element of Congress's careful balancing of competing tribal and state interests, achieved after years of effort. *See* S. Rep. 446, *supra*, at 13-14; *see generally* Santoni, *The Indian Gaming Regulatory Act: How Did We Get Here? Where Are We Going?*, 26 Creighton L. Rev. 387, 395-403 (1993). Construing IGRA to authorize greater judicial power than the text allows "would destroy the delicate federal/tribal/state balance sought by the Act." Pet. Br. 14. *See also* 134 Cong. Rec. 25,377 (1988)

[8] These basic requirements were not repudiated by *Steffel v. Thompson*, 415 U.S. 452 (1974), which nowhere held that a federal court may issue a declaratory judgment that the defendant is free to disregard (as under IGRA) without any judicial sanction (federal or state). It seems clear, in fact, that a declaratory judgment issued under *Steffel*, like other declaratory judgments, may be enforced, if necessary, under 28 U.S.C. § 2202. *See Wooley v. Maynard*, 430 U.S. 705, 710-12 (1977) (injunction allowed if necessary).

(remarks of Rep. Udall) ("S. 555 is a delicately balanced compromise.").

A more intrusive remedy would also raise other constitutional concerns, which Congress gave no indication it intended to raise. As this Court made clear in *New York v. United States*, 112 S. Ct. 2408 (1992), given the structure of federalism embodied in the Constitution and reflected in the Tenth Amendment, a serious question is presented when Congress, rather than itself making and administering policy in an area at the federal level, forces States to exercise the States' own sovereign governmental authority. *Id.* at 2420-21. A reading of IGRA that would authorize federal court *compulsion* of States to negotiate a legislative deal with Tribes, as a substitute for a federal policy determination of the scope of any authority for Class III gaming, would raise precisely that constitutional question. The Article III problem with IGRA, created by an attempt to avoid federalism difficulties, cannot be solved by a judicial rewriting of IGRA that would raise those difficulties.

II. THE FEDERAL COURT'S EXERCISE OF JURISDICTION OVER THE TRIBE'S SUIT VIOLATES THE CONSTITUTION'S PROTECTION OF THE STATES' SOVEREIGN IMMUNITY

A. *Ex Parte Young* Does Not Remove The Tribe's Claim Against The Governor From The Coverage Of Eleventh Amendment Immunity

The Tribe and the United States suggest that the principal Eleventh Amendment question at issue here—whether IGRA validly abrogates States' immunity—may be avoided, at least as a practical matter, by invocation of *Ex Parte Young*, 209 U.S. 123 (1908). *See* Pet. Br. 23-31; U.S. Br. 12-19 & n.5. Under that theory, the Tribe's claim against the Governor is not truly a suit against the State within the meaning of the Eleventh Amendment (*see, e.g., Edelman v. Jordan*, 415 U.S. 651 (1974)), so that no immunity question would arise with respect to the Tribe's claim against the Governor. This

invocation of *Ex Parte Young* should be rejected, because the Tribe's suit under IGRA presents a radically different balance of federal and state interests from the balance justifying application of the *Young* doctrine.

The starting point is the basic principle that a suit against a state official seeking relief that runs against the office holder in that person's official capacity is in reality a suit against the State. *See Hafer v. Melo*, 502 U.S. 21, 25-27 (1991); *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984). This Court in *Ex Parte Young*, however, created a legal "fiction" carving out an exception to that basic principle. *See Pennhurst*, 465 U.S. at 105; U.S. Br. 25 (*Young* creates " 'fiction' " where State is real party in interest). Under that exception, a suit against a state officer seeking an *injunction* against future violations of federal law generally is deemed not to be a suit against the State for purposes of States' Eleventh Amendment immunity. *See, e.g., Pennhurst; Edelman.*

This doctrine rests on a judgment about constitutional "necessity" as a justification for overriding the otherwise-applicable constitutional immunity of States in a particular class of cases. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 113 S. Ct. 684, 688 (1993) (*Young* "is regarded as carving out a necessary exception to Eleventh Amendment immunity"); *see Green v. Mansour*, 474 U.S. 64, 68 (1985); *Pennhurst*, 465 U.S. at 105. In our federalist system, *Young* makes clear, the supremacy of federal law requires that federal courts be able to enjoin state officers' future non-compliance with federal-law standards in order "to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.' " *Pennhurst*, 465 U.S. at 105 (quoting *Young*, 209 U.S. at 160). Even so, as an exception to fundamental structural constitutional principles, the *Young* doctrine has been carefully confined to apply only where *necessary* to vindicate federal interests; beyond that, the Court has explained "that the need

to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States." *Pennhurst*, 465 U.S. at 105.

The first, sufficient reason why the Tribe's suit under IGRA is outside the ambit of *Young* is that there is little if any "federal necessity" for allowing the IGRA claim. As we have explained, and the Tribe and the United States vigorously insist, "the limited nature of the relief authorized by IGRA" (U.S. Br. 25) means that the federal court under IGRA issues no injunction or other enforceable order that compels the Governor to adhere to federally established standards. The federal court cannot enforce compliance with the federal duty asserted, *i.e.*, cannot compel negotiation (or agreement). Even if the court's role under IGRA is permitted by Article III (*but see* Argument I, *supra*), it is decidedly beyond the reach of the *Ex Parte Young* doctrine. *Cf. Green v. Mansour*, 474 U.S. at 73 (declaratory relief would threaten *Edelman* limit on *Young* if not related to injunctive relief). There can be no plausible claim that any structural *need* to vindicate the supremacy of federal law, on which *Young* rests, requires that state officials be subject to a judicial order that "the state can disregard" (Pet. Br. 26), for such an order does not "*secure* compliance with federal law" (U.S. Br. 13 (emphasis added)). Because the entire justification for *Young* is absent, the doctrine should not apply to the peculiar cause of action created by IGRA.[9]

Ex Parte Young should, if necessary, be held inapplicable for a second reason as well: the interests on the state side of the constitutional balance are distinctively

[9] The Eleventh Circuit, in finding *Young* inapplicable, alluded to the unenforceability of the judicial order under IGRA as follows: "since IGRA provides a procedure should the state decide not to negotiate, even the mere question of whether the state should negotiate at all is subject to discretion." Pet. App. 23a-24a, quoted at Pet. Br. 29. As noted above, the limited character of the federal intrusion cannot be disregarded, because it reflects federalism principles that are an essential aspect of IGRA.

strong. In the ordinary *Young* situation, a state official is enjoined to refrain from executive or administrative actions that violate substantive federal standards governing such actions (set by the Constitution or by federal statute or regulation). Under IGRA, by contrast, the suit seeks ultimately to require an affirmative exercise of state legislative authority (setting rules for tribal gaming), essentially as a substitute for federal policy choice in the area. *See* Pet. App. 23a. The intrusion on state sovereignty is categorically extraordinary, if not wholly unprecedented, in this circumstance. *Cf. New York v. United States* (special category of federalism problems with federal directives requiring the exercise of state legislative authority). Holding the *Young* doctrine inapplicable in this unusual situation would appropriately "accommodate[]" the doctrine to reflect States' constitutional interests (*Pennhurst*, 465 U.S. at 105) while leaving unimpaired the federal government's power to make needed policy choices, and set enforceable federal standards, itself. In short, *Young* should not apply to IGRA because, in addition to the federal interest being distinctively weak, the State's interest—in being treated as a State when its most sovereign function is at stake—is distinctively strong.

It is no answer to say that Eleventh Amendment immunity is chiefly concerned with money judgments. This Court has often held that the Eleventh Amendment's "jurisdictional bar applies regardless of the nature of the relief sought." *Pennhurst*, 465 U.S. at 100; *see Cory v. White*, 457 U.S. 85, 90-91 (1982); *Missouri v. Fiske*, 290 U.S. 18 (1933). Moreover, the principle of sovereign immunity, protecting States' dignity and independence (*Puerto Rico Aqueduct & Sewer Auth.*, 113 S. Ct. at 689), is centrally implicated by federal intrusions into the exercise of state lawmaking power. What is distinctive about injunctive claims, under *Young*, is not that the States' interest is weaker, but that the necessity justification for *overriding* the States' immunity is stronger. Where no such justification is present, however, the constitutional protection of States' immunity retains its full force. Accordingly, the Tribe's suit should be recognized as one entirely against the State, subject to dismissal under the Eleventh Amendment unless Congress has validly abrogated States' immunity.

B. Congress Did Not Clearly Intend In IGRA To Abrogate The States' Eleventh Amendment Immunity

The question of congressional power to abrogate States' Eleventh Amendment immunity need not be reached unless IGRA is construed as effecting such an abrogation. On this threshold issue of statutory interpretation, this Court has laid down "a simple but stringent test: 'Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.'" *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989), quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). This Court should hold that IGRA does not meet this standard.

The entirety of the argument for finding that IGRA effects an abrogation—unavoidably, because there is no other evidence of congressional consideration of the immunity question—is that the statute refers several times to the "State" in describing the Tribe's cause of action. *See* U.S. Br. 20. These references are indubitably a very important fact in the analysis, but to deem them utterly conclusive in the present circumstances would mistakenly treat the demand for clear textual statement as somehow an end in itself. In fact, the textual requirement is imposed, not for its own sake, but as a guarantor of the underlying congressional *intent* to take the constitutionally extraordinary step of overriding States' immunity: congressional intent to abrogate remains the test, and that intent must be proved with "certainty." *Atascadero*, 473 U.S. at 243 [10]; *see Dellmuth*, 491 U.S. at 231 ("the

[10] "[I]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guar-

salient point in our view is that it cannot be *said with perfect confidence that Congress in fact intended . . .* to abrogate sovereign immunity, and imperfect confidence will not suffice given the special constitutional concerns in this area" (emphasis added)). In IGRA, the references to the "State" are not enough to show "that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States." *Quern v. Jordan*, 440 U.S. 332, 345 (1979).

The United States's discussion of *Ex Parte Young* (*see* U.S. Br. 18) effectively explains why the statutory language cannot carry the required weight. Because States "can act only through their officials" (U.S. Br. 18, citing *Pennhurst*, 465 U.S. at 114 n.25), the United States correctly insists that, when Congress used the word "State," it undoubtedly was contemplating that the negotiating obligation imposed by IGRA would fall on, and the suits invoking that obligation would be brought against, "those officials vested with authority under state law to negotiate on behalf of the States" (U.S. Br. 18).[11] Surely that is the natural congressional understanding behind the enactment of a statute that does not provide for retrospective relief, since the established doctrine of *Ex Parte Young* generally makes it unnecessary for a plaintiff suing under such a statute to name the State itself as a defendant and hence unnecessary for Congress to consider the question of, or decide to abrogate, Eleventh Amendment immunity.

---

antees of the Eleventh Amendment. The requirement that Congress unequivocally express this intention in the statutory language ensures such certainty." *Atascadero*, 473 U.S. at 243.

[11] Congress likely assumed that in each State a particular official (particularly, the Governor) would have authority to conduct the negotiations required by IGRA. *See* Santoni, *supra*, at 424. The article just cited contains a list of compacts under IGRA as of 1993. Except for Kansas, we are aware of no evidence casting doubt on the complete authority of the Governor in each State, not only to negotiate, but to enter into compacts under IGRA. (With respect to Kansas, see *Kickapoo Tribe v. Babbitt*, 43 F.3d 1491 (D.C. Cir. 1995).)

The text of IGRA is for that reason fully, and most naturally, understood as indicating only a congressional intent to authorize suits against state officials, for which Congress assumed that no abrogation of Eleventh Amendment immunity was required. And the relevant legislative history is, apparently, devoid of any evidence that Congress actually thought about the subject of Eleventh Amendment immunity and decided to abrogate it. That silence is telling in itself, because abrogation is, at a minimum, an extraordinary action in our federal system. *See Quern v. Jordan*, 440 U.S. at 343 (silence significant under 42 U.S.C. § 1983). It is even more significant against the background of grave uncertainty about Congress's constitutional authority to abrogate States' immunity under Article I. It would be surprising if Congress meant to exercise this disputed authority when it left no record of its consideration of the issue and almost surely assumed that it had no need to exercise the authority.

These compelling reasons to conclude that Congress did *not* make a decision to abrogate States' immunity are not altered by the fact, as we have argued, that Congress was mistaken in thinking that *Ex Parte Young* applies and makes abrogation unnecessary.[12] Whether or not Congress's assumption was erroneous, there is no indication that Congress intended to take away States' constitutional immunity. And, in a statute reflecting so delicate a balance of state, federal, and tribal interests, it cannot be assumed that Congress would have enacted the same scheme had it recognized that doing so would compel stripping States of their Eleventh Amendment immunity. For these reasons, the Court should find that

---

[12] Congress may also have thought that 28 U.S.C. § 1362 abrogated immunity (*see Implementation and Enforcement of the Indian Gaming Regulatory Act*, Oversight Hearings before the House Comm. on Interior and Insular Affairs, 102d Cong., 2d Sess. 146, 149 (1992))—though that assumption has turned out to be incorrect. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991).

IGRA does not embody a clearly intended abrogation of Eleventh Amendment immunity.

C. Congress Lacked Power To Abrogate The States' Eleventh Amendment Immunity

This Court in *Union Gas* held that Congress has power to abrogate States' Eleventh Amendment immunity, but the plurality opinion was carefully limited to the question of power under the Interstate Commerce Clause. 491 U.S. at 13-23. Elsewhere, the Court has left open the question of abrogation authority under the Indian Commerce Clause. *Oneida County v. Oneida Indian Nation,* 470 U.S. 226, 252 (1985). This Court should, at a minimum, decide that no such authority exists under the Indian Commerce Clause. More broadly, *Union Gas* should be overruled and Article I authority to override States' sovereign immunity denied.[13]

1. *Even If* Union Gas *Is Correct, Congressional Power Is Lacking Under the Indian Commerce Clause*

Even if this Court declines to disturb the holding of *Union Gas* that Congress has abrogation authority under the Interstate Commerce Clause, the Court nevertheless should hold that abrogation authority is lacking under the Indian Commerce Clause. The plurality opinion in *Union Gas* accepted that, in order to find congressional authority to abrogate States' sovereign immunity under Article I, the Court has to find that "there has been '"a surrender of this immunity in the plan of the convention."'" *Union Gas,* 491 U.S. at 19 (plurality), quoting *Monaco v. Mississippi,* 292 U.S. 313, 322-23 (1934) (quoting *Federalist No. 81*). And in explaining why it found an implicit surrender with respect to the Inter-

[13] The lack of abrogation authority under Article I as a whole is a ground for answering the first question presented in the petition: does Congress have abrogation authority under the Indian Commerce Clause? Pet. i. The petition does not, however, encompass any claim that abrogation authority exists for IGRA solely under the Interstate Commerce Clause.

state Commerce Clause, the plurality relied centrally on the role played by that provision in solving problems of an inherently interstate character, where single-State solutions often affirmatively harm other States. *Id.* at 20-22 (discussing protectionist state environmental laws). That crucial starting point for the *Union Gas* inference of intrinsic surrender, however, is inapplicable to the Indian Commerce Clause.

As the example of state protectionist legislation discussed in *Union Gas* indicates, the congressional power to regulate *interstate* commerce rests, at least in large part, on the need for a national authority to protect the interests of the *States* themselves. Particularly in the early days of the federal government, when the Interstate Commerce Clause was used for the more focused purpose of protecting the commercial aspects of interstate commerce (*see* G. Gunther, *Constitutional Law* 97-98 (12th ed. 1991)), it would have been plausible for States to view legislation that imposed a duty on States' roles in certain interstate commerce as generally serving to protect the interests of other States in that commerce. In a constitutional sense, therefore, the States forming the Constitution might naturally have viewed themselves as having an inherent mutuality of interest in national legislative authority under the Interstate Commerce Clause. And that mutuality of interest lends some conceptual support to the notion that States, in the Convention, may have implicitly surrendered to Congress the power to hail States into federal court, ultimately for their reciprocal protection against each other.

No such concept of inherent mutuality, or reciprocity, applies under the Indian Commerce Clause. The interests served by statutes enacted under this provision, though they *might* include various States' interests, have no necessary or intrinsic connection to States' interests. The Indian Commerce Clause thus lacks a core feature undergirding any inference of implicit surrender of the full scope of sovereign immunity—*i.e.*, of unabrogable im-

munity, protected even against congressional override—under the Interstate Commerce Clause.

This distinction gains powerful support from this Court's decisions making an analogous distinction with respect to the basic Eleventh Amendment immunity itself. Whereas the Court has long held that States, by entering the Union, necessarily surrendered their entire immunity from suits by other States (*Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 720 (1838)), the Court recently has held that States did *not* surrender their immunity from suits by Tribes, because the intrinsic "mutuality" was lacking. *Blatchford*, 501 U.S. at 782. The same principle supports excluding the Indian Commerce Clause from any doctrine finding in the Interstate Commerce Clause an implicit surrender by States of part of their sovereign immunity.[14] Indeed, the Tribe recognizes that "*Blatchford* precludes the Seminole Tribe from arguing state consent in the 'plan of the convention'" (Pet. Br. 16)—the very standard applied by the plurality in *Union Gas*.

The Indian Commerce Clause is for the foregoing central reason a *less* plausible basis for abrogation authority than the Interstate Commerce Clause. Not surprisingly, therefore, there is little basis for the countervailing suggestions that this case is actually a *more* plausible candidate for finding an implicit surrender of partial immunity

[14] This point is not affected by the power of Congress to abrogate Tribes' sovereign immunity. *See Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). That authority is not based on any voluntary surrender of immunity by Tribes, which, unlike the States, did not join together to form the Constitution. *Blatchford*, 501 U.S. at 782. Any congressional authority to diminish the full protection of immunity enjoyed by States, in contrast, must come from a voluntary surrender in the Convention, as the plurality in *Union Gas* accepted. 491 U.S. at 19. The States, as the "parties" to the Constitution, could have a mutuality of concession in forming the Constitution that Indian tribes cannot. *Cf. Blatchford*, 501 U.S. at 782 (differences between States and foreign governments, in suing States, based on the different "role of each in the convention").

than *Union Gas*. Thus, although the Tribe heavily emphasizes the "plenary" nature of congressional power under the Indian Commerce Clause and the troubled pre-1787 experience that gave rise to that power (Pet. Br. 17-21), the United States properly avoids such an argument (U.S. Br. 24-28), because both parts of the Tribe's contention are equally true of the Interstate Commerce Clause. *See Union Gas*, 491 U.S. at 17 (plurality); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935). Likewise, we fail to understand how the absence of direct tribal representation in Congress (Pet. Br. 21) suggests an inference of greater state surrender of control over immunity under the Indian Commerce Clause than under the Interstate Commerce Clause. Finally, the "special responsibility" of the United States toward Indian tribes (U.S. Br. 24) tends, if anything, to confirm the lack of any distinct need for abrogation authority: that special responsibility should make it particularly easy for the United States itself to bring suits to protect tribal interests, as it long has done without Eleventh Amendment impediment (*Blatchford*, 501 U.S. at 783; *Arizona v. California*, 460 U.S. 605, 614 (1983)).

2. Union Gas *Should Be Overruled*

If the Court concludes that the Indian Commerce Clause cannot meaningfully be distinguished from the Interstate Commerce Clause for purposes of assessing congressional abrogation authority, then the Court should overrule *Union Gas* and hold that Congress lacks power under Article I to override States' sovereign immunity from suit in federal court. This Court has overruled numerous decisions, particularly in constitutional cases, where no strong reliance on the precedent had been built up, where the stable development of legal principles was not threatened, and where the reasoning of the precedent was out of step with related law and had been subject to persuasive criticism. *See Payne v. Tennessee*, 502 U.S. 808, 827-30 (1991). The Court's decision in *Union Gas* is a proper candidate for departure from *stare decisis*.

To begin with, we are aware of no substantial pattern of congressional reliance on the authority announced in *Union Gas*. Moreover, *Union Gas* has become ever more aberrational, in light of subsequent decisional law on related aspects of the protection of state authority against federal power, in its attribution of relatively little importance to state sovereignty in our federalist structure. *See, e.g., United States v. Lopez*, 63 U.S.L.W. 4343 (Apr. 26, 1995); *New York v. United States; Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Puerto Rico Aqueduct & Sewer Auth.*; *Dept. of Revenue v. ACF Industries, Inc.*, 114 S. Ct. 843, 850-51 (1994). Most strikingly, *Union Gas* comes with a special, perhaps unique, reason why the Court should undertake a fresh reconsideration of the merits of the question of congressional power: there is no rationale of the Court, or even of five Justices, supporting the holding in *Union Gas*, because Justice White, who provided the fifth vote for the result but did not join the plurality, specifically said that he disagreed with much of the plurality's reasoning and yet stated no rationale of his own. 491 U.S. at 56-57 (White, J., concurring in relevant part). The other four Justices, moreover, leveled severe criticisms at the plurality's reasoning. 491 U.S. at 30-42 (Scalia, J., joined by Rehnquist, C.J., O'Connor, J., and Kennedy, J., dissenting in relevant part). The central value supporting *stare decisis*—stability of legal principles—carries little weight where a case establishes no legal principles that could reasonably be relied on.

On reconsideration of the issue, congressional abrogation authority under Article I should be found lacking. As explained above, the notion of mutuality of state interests in the power to regulate interstate commerce lends some support to an inference of a structurally implicit surrender of immunity. But that notion is not in the end a sound enough basis for the suggested inference. For reasons set out in the dissent in *Union Gas*, there are much stronger considerations weighing against finding a

ceded power to Congress in Article I to override the sovereign immunity of States in Article III courts.

Perhaps most fundamentally, as a historical and structural matter, the outer limits of the "judicial power" have always been defined by Article III and have never been subject to expansion by Congress through its Article I power. That fundamental principle was established by this Court in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and in the long line of decisions growing out of *Hayburn's Case*. This Court has consistently adhered to the same fundamental principle that Article III sets the limits of the judicial power—limits that Congress was not authorized, by Article I, to expand. *See, e.g., Mesa v. California*, 489 U.S. 121, 136 (1989); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 (1983); *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 607, 615-16 (1949) (opinion of Rutledge, J., joined by Murphy, J.); *id.* at 626-38 (opinion of Vinson, C.J., joined by Douglas, J.); *id.* at 646-55 (opinion of Frankfurter, J., joined by Reed, J.); *Kline v. Burke Construction Co.*, 260 U.S. 226, 234 (1922); *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809).[15]

---

[15] Congress, in exercising its Article I power to create federal law, may bring a case *within* Article III limits by making it one properly "arising under" federal law. *See Verlinden B.V.*, 461 U.S. at 496. Although the quantum of substantive federal law Congress must create to achieve that result has been debated (*e.g.*, in discussing "protective jurisdiction"), *see Mesa*, 489 U.S. at 137-38, the very premise of that debate is the lack of any Article I power to expand Article III limits.

Similarly, the Court's decision in *Mistretta v. United States*, 488 U.S. 361 (1989), leaves undisturbed the longstanding recognition that Congress may not assign adjudicatory powers to the federal courts outside the limits set by Article III. The Court in *Mistretta* upheld an assignment of certain rulemaking functions to the Sentencing Commission, but only after taking care to stress that the Commission, though "located in the Judicial Branch," is not a court and does not purport to exercise the judicial power. *Id.* at 393.

This basic principle applies to the sovereign immunity at issue here. That immunity, this Court has held since *Hans v. Louisiana*, 134 U.S. 1 (1890), defines a limit on the reach of the "judicial power" granted by Article III. *See Pennhurst*, 465 U.S. at 98 ("this Court has recognized that [the Eleventh Amendment's] greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III") (quoting and citing prior decisions to same effect). Reading Article I to allow Congress to exceed that limit is no more justified than reading Article I to allow Congress to exceed other limitations on Article III power, including the limitation of subject matter jurisdiction to the categories enumerated in Article III or the limitation of power to "cases" or "controversies" or the limitation to the "judicial" function reflected in the Article III doctrine discussed in Argument I of this brief. *See Union Gas*, 491 U.S. at 39-40 (Scalia, J., dissenting in part).[16]

Adherence to this bedrock understanding of the relation of Article I and Article III authority is particularly important in the present context. After all, the (implied) Article III limit that the Tribe and the United States seek to allow Congress to override is one that, ever since *Hans* was decided, has been recognized as helping to define the essential structure of federalism under our Constitution. *See Pennhurst*, 465 U.S. at 99-100. That structure would be seriously weakened if protection of States' sovereign immunity were turned into a mere default rule, freely alterable by the federal government. *Union Gas*, 491 U.S. at 38 (Scalia, J., dissenting in part).

---

[16] The plurality in *Union Gas* thought it significant that the Eleventh Amendment restricts only the "judicial power," not congressional authority. 491 U.S. at 18. But because Congress has no authority under Article I to expand the judicial power conferred by Article III, a limit on the judicial power implicit in Article III—such as sovereign immunity, as reflected in the Eleventh Amendment—automatically limits congressional authority under Article I.

Nor does the federal-state balance established by the Constitution require broad congressional abrogation authority under Article I for the vindication of the supremacy of federal law. Apparently, Congress did without Article I abrogation power until *Union Gas*. And the unquestioned doctrine of *Ex Parte Young* already ensures, without need of abrogation authority, that federal law can be vindicated against States on a prospective basis. Certainly, our constitutional system has not historically demanded the amenability of the federal government itself to suit (even for constitutional violations, substantively beyond congressional control). *See Union Gas*, 491 U.S. at 33-34 (Scalia, J., dissenting). Indeed, many if not all uniquely strong federal interests that might "require" suits against States in federal court can be protected through the ability of the United States itself to sue States in federal court, without impediment from the Eleventh Amendment. *See Blatchford*, 501 U.S. at 783.

Finally, Article I authority to abrogate States' immunity does not follow, logically or practically, from the holding of *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), that Congress may abrogate such immunity under Section 5 of the Fourteenth Amendment. As a subsequent amendment, of course, the Fourteenth Amendment can alter pre-existing law and confer abrogation authority without remotely suggesting that the original Constitution conferred such power. And in inferring that the Fourteenth Amendment *should* be construed as adding a previously lacking power to Congress, it is powerfully relevant that the alteration at issue is a narrow one, restricted to specific topics where federal limits on state authority were peculiarly necessary. The alteration of the basic balance of state and federal authority reflected in the original preservation of States' sovereign immunity is accordingly a limited one, not the sweeping transformation of federal-state relations that would be wrought by a finding of broad abrogation authority under Article I. *See Union Gas*, 491 U.S. at 41-42 (Scalia, J., dissenting in part).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

RICHARD G. TARANTO
FARR & TARANTO
2445 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

RICHARD RUDA *
Chief Counsel
LEE FENNELL
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 434-4850
* *Counsel of Record for the* Amici Curiae

May 3, 1995